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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 797

AMERICAN COMMERCIAL LINES, INC., *ET AL.*,
Appellants,

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
and
THE PENNSYLVANIA RAILROAD COMPANY, *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the three-judge District Court for the Western District of Kentucky in No. 5227, *Louisville and Nashville Railroad Company and The Pennsylvania Railroad Company v. United States and I.C.C.* (App. 12) is reported at 268 F. Supp. 71 (1967).

The initial report of the Interstate Commerce Commission, Division 2, in Investigation and Suspension Docket No. 8038, *Ingot Molds, Pa. to Steelton, Ky.* (App. 35), is re-

ported at 323 I.C.C. 758 (1965). The final report and order of the Commission on reconsideration (App. 60) is reported at 326 I.C.C. 77 (1965).

JURISDICTION

This action was brought by appellees in a three-judge federal district court under 28 U.S.C. 1336, 2321-2325, to enjoin, annul and set aside an order of the Interstate Commerce Commission in *Ingot Molds, Pa. to Steelton, supra.*

The judgment of the United States District Court for the Western District of Kentucky setting aside the order of the Commission and remanding the matter for reconsideration was entered on May 15, 1967. (App. 32) Notice of appeal was filed with the district court on July 13, 1967). (App. 11)

The jurisdiction of this Court under 28 U.S.C. 1253 and 2101(b) to review the judgment of the district court on direct appeal was invoked and, by order entered January 15, 1968, this Court noted probable jurisdiction.

STATUTES INVOLVED

The National Transportation Policy (49 U.S.C. preceding Sections 1, 301, 901 and 1001) and Section 15a(3) of the Interstate Commerce Act (49 U.S.C. 15a(3)) both of which are reproduced in the Joint Appendix to Briefs (App. 34).

QUESTIONS PRESENTED

This appeal presents issues which far transcend in importance the particular railroad rate or the competition for the ingot molds traffic which is directly involved. The ultimate question, in what has undeniably become a "test case" in the railroads' legislative-judicial campaign of recent years to substantially increase their share of the total transportation market, is the lawfulness of selectively reduced rail rates,

below the railroads' full costs, established with the aim of diverting traffic from lower-cost water carriers. This fundamental and, from the standpoint of both the barge lines and the public, critical question, arises within the framework of a drastic reduction in the particular point-to-point rail rate upon a commodity, ingot molds, which is itself of minor traffic significance.. This rate has apparently been chosen, however, by the proponent railroads as the vehicle for seeking to assert their so-called "incremental" or out-of-pocket cost theory of competitive rate-making.

More strictly speaking, the questions presented by this appeal arise from the opinion and judgment of the District Court which set aside and permanently enjoined the order of the Interstate Commerce Commission in *Ingot Molds, Pa. to Steelton, Ky.*, 323 I.C.C. 758, 326 I.C.C. 77 (App. 35, 60), and remanded the matter to the Commission for appropriate action. As previously recited in the Jurisdictional Statement of these appellants, the questions are:

1. Did the District Court err in holding that the Commission failed to state a rational basis and make adequate findings to support its conclusion that full costs of two competing modes must be compared to determine which mode has the inherent cost advantage within the meaning of the National Transportation Policy?

2. Did the District Court err in holding "that the Commission has failed to state a rational basis to support its selection of the 'fully distributed' costs of the barge-truck mode as the floor for reduced railroad rates"?

3. Did the District Court err in holding that the Commission's use of full cost to determine which mode possessed the inherent advantage is contrary to *Interstate Commerce Commission v. New York, N. H. & H. R.R. Co.*, 372 U.S. 744, 760-761 (1963).

4. Did the District Court err in holding that the Commission misinterpreted and misapplied the Transportation Acts of 1940 and 1958 in comparing the full costs of competing modes of transportation to measure inherent advantage?

5. Did the District Court err in holding that the Congress intended to restrict the power of the Commission, without discretion, to determine the lawfulness of the competitive rates under Section 15a(3) of the Interstate Commerce Act to consideration of a single test – whether such rates are above out-of-pocket costs.

STATEMENT OF THE CASE

Description of Appellants

Appellants, American Commercial Lines, Inc., Mississippi Valley Barge Line Company, Ohio River Company, and Union Barge Line Corporation are certificated common carriers authorized by the Interstate Commerce Commission to conduct water carrier service between ports and points on the Mississippi River system. Waterways Freight Bureau is a voluntary non-profit organization, composed of common carriers by water engaged in the transportation of freight by barge. The principal functions of the Bureau relate to rate-making procedures.

Background of the Proceeding

To state that the present controversy began in the late months of 1963 with the publication by the two principal railroad appellees of a reduced rate on ingot molds between the involved points is like reporting that the United States began with the ratification of the Constitution. Such recitals, while technically accurate, are highly insensitive to an appreciation of the degree to which the "past" is, indeed, "prologue" to the present and future. In this instance, the

pre-1958 decisions of the Commission in intermodal rate cases, the legislative history of Section 15a(3) of the Interstate Commerce Act enacted in that year, and the recent consideration by this Court of the history and purpose of that provision, like the underside of the iceberg, are all an integral, even if unseen, part of this railroad "test case."

In the era before the enactment of Section 15a(3) in the Transportation Act of 1958, marked as it was by the gradual development of carrier cost-finding skills, the Commission, admittedly vacillating in its approach, struck down a number of railroad rate proposals on the ground of prospective traffic diversion from competing water carriers. In thus seeking to allocate a "fair share" of the traffic to the water carriers so as to keep them operational and financially afloat, the Commission, more often than not, made no determination of relative advantage as between the modes of transportation, although earlier it had employed this standard. The typical result of the attempted allocation of traffic was the prescription of a differential in the rates of the water carriers under those maintained by the rails.

The railroads clamored for, and were eventually accorded, remedial legislation against Commission "protectionism" but, most significantly, as will be seen hereinafter, in intermodal contests it was not the sweeping elimination of regulatory restraint that they had sought. Nevertheless, it must be conceded that the legislation which ultimately materialized as Section 15a(3) deprived the Commission of its erstwhile role of "giant handicapper" and compelled the consistent application of an earlier, admittedly oft-disregarded, standard in intermodal rate controversies. It is the nature of that standard – as to which it is here urged that the District Court has seriously erred – which constitutes a primary issue in this proceeding.

This Court has previously been called upon to provide guidelines to the Commission in this endeavor to resolve disputed intermodal rate actions in *Interstate Commerce Commission v. New York, N. H. & H. R.R. Co.*, 372 U.S.

744, decided in 1963. In the *New Haven* case, which was actually disposed of upon other grounds because the cost comparisons essential to a determination of inherent advantage under the National Transportation Policy were there lacking, this Court, after a comprehensive review of the legislative history of Section 15a(3), "spelled out" the functions and responsibilities of the Commission in just such a situation as was almost immediately thereafter presented in the *Ingot Molds* case. It was with the statutory construction and guidelines of *New Haven* freshly in mind that the Commission approached the issues presented by the ensuing publication by the Pennsylvania and Louisville & Nashville railroads of the reduced rate on ingot molds between the Pittsburgh area and Steelton, Ky. That rate, corresponding exactly (and not coincidentally) to the barge-truck level, was filed by those railroads shortly after the *New Haven* decision with the obvious purpose of seeking a resolution of the issues which the railroads believed had not been there completely settled because of the deficiencies of the record in that case.

Proceedings Before the Commission

The instant controversy commenced with the publication by the Pennsylvania and L&N, in schedules then proposed to be made effective December 1, 1963, of a reduced rate on ingot molds and ingot mold stools from Neville Island and Pittsburgh, Pa. to Steelton, Ky. of $5.11 per gross ton, minimum weight 600 tons in a single shipment and 125,000 pounds per car, moving in 12 or less cars at one time. The then applicable rail rate on these commodities between the same points, converted to gross tons, was $11.86, subject to a carload minimum weight of 100,000 pounds, but, very little of the involved traffic moved at that substantially higher rate.

The total charge for movement in the competing barge-truck service was the same as the later matching rail rate, $5.11 per ton, consisting of a barge rate of $3.32, minimum 600 gross tons, a transfer charge of 95 cents at Owensboro,

Ky. and a truck charge of 84 cents for the 3.5 miles from the river terminal to destination. It is abundantly clear that the substantially reduced rail rate, together with its accompanying minimum weight requirements, was fixed *without reference to railroad costs or any other railroad service considerations* at the precise level of the barge-truck service with a view to diverting the ingot molds traffic from the water onto the rails. The District Court has now held, in effect, however, that this railroad rate, made expressly to achieve rate equality with the competition, is to be judged as to lawfulness without regard to the demonstrated superiority of that competition so long as it covers the rails' out-of pocket costs.

Upon protest by appellant, Waterways Freight Bureau, the proposed rail rate was suspended and placed under investigation by the Commission. The statutory period of suspension was voluntarily extended by the railroads until after Division 2 of the Commission had found the rate to be lawful. (App. 35) Thereafter, the railroads made the rate effective on March 19, 1965 and it continues to apply at the present time, notwithstanding the fact that the entire Commission, in its report and order of November 9, 1965, here in issue, subsequently found the rate to be unlawful and ordered it canceled. (App. 60) The facts are clearly stated in the several reports of the Commission and appear to be undisputed by the parties. As previously indicated, from the time that the plant of the receiver at Steelton was completed in 1953 until the reduced rail rate, which is the subject of the controversy, became effective in 1965, the preponderance of the ingot molds traffic moved via the barge-truck route. The report of Division 2 recites that the barge lines handled 4,320 tons in 1962, 5,017 tons in 1963 and 1,500 tons during the first three months of 1964 whereas the railroad traffic for the corresponding periods was 112, 276 and 116 tons, respectively. (App. 37-38) Although similar traffic comparisons for the period *after* the reduced rail rate became effective are not of record, the Commission found, without contradiction, that "rail respondents virtually

conceded that all of the traffic would move by rail." (App. 64) The ensuing diversion of the preponderance of the ingot molds traffic from the barge-motor route has not been disputed.

The report of Division 2, finding the rail rate to be lawful, was served on February 17, 1965. (App. 35) It determined, upon the basis of cost evidence presented by the parties, that the railroads' costs of providing the involved service under the then proposed $5.11 rate were $4.689 per ton, out-of-pocket, and $7.594 on a fully-distributed basis, and concluded, therefore, "that the proposed rate exceeds the respondents' out-of-pocket costs, but is below their fully distributed costs." (App. 39) It was further found that full costs via the barge-truck route computed at $5.1959 afforded a valid comparison with rail fully-distributed costs. (App. 39).

Turning to the threshold issue, Division 2 ruled, just as did the entire Commission thereafter, that the foregoing rail and water-motor fully-distributed costs constitute the appropriate standard for comparing the inherent advantages of low cost in this intermodal rate dispute. It went on, however, to hold that the barge lines had, in effect, waived their right to protection against the equalizing rail reduction by voluntarily maintaining a rate producing total charges ($5.11) below the barge-truck full costs ($5.19) developed in this proceeding.

Reconsideration of the report of Division 2 was sought by both the rail carrier respondents and the barge line protestants, the former to eliminate the standard of fully distributed cost as the measure of the low cost mode and the latter to reverse the Division's finding that the barge line had waived the right to protection of its inherent cost advantage. Upon reconsideration, the entire Commission, by its report of November 9, 1965 (App. 60), sustained the finding by Division 2 that fully distributed costs should constitute the measure of inherent cost advantage within the meaning of the National Transportation Policy. The Commission likewise agreed with the Division that, by this

standard, the inherent advantage of lower cost lies with the barge-truck route. The Commission reversed the Division's report with respect to the alleged waiver, holding that an inherent cost advantage either exists or does not exist and is not to be lost by, as here, the inadvertent establishment of a rate below a carrier's fully distributed cost level. (App. 68-69) Accordingly, the Commission required that the reduced equalizing rate of the railroads be canceled on the ground that "by reducing its rate below the level of the barge-truck full costs, respondent railroads have unlawfully impinged upon the ability of the barge-truck mode competitively to assert its inherent cost advantage." (App. 71) In view of its findings, the Commission denied the railroads' petition for reconsideration.

Proceedings Before the District Court

Appellees, Pennsylvania and L&N, the two railroad respondents before the Commission, directed to cancel the reduced rate here in issue, filed suit in the U. S. District Court, Western District of Kentucky, to set aside the Commission's order on the grounds, generally, that it was based upon an unlawful and erroneous interpretation of the governing statutes and lacking in a stated rational basis. Attesting to the importance of the issues here involved, forty-eight additional railroads – virtually all of the major railroads in the United States – intervened as plaintiffs below in this proceeding. The barge lines, appellants here, together with the American Trucking Associations, Inc., the National Motor Freight Traffic Association, Inc., the National Tank Truck Carriers, Inc., the American Waterways Operators, Inc., appellants in the related appeals in Nos. 804 and 808, were permitted by the District Court to intervene in support of the Commission's order. The Department of Justice, for the United States, confessed error and participated before the District Court as an additional plaintiff.

The opinion and judgment of the three-judge District Court, invalidating the Commission's order upon the two

stated grounds of lack of a rational basis and inconsistency with the objectives and purposes of Congress in enacting Section 15a(3), were entered on May 15, 1967. (App. 12, 32) Notice of appeal was filed by these appellants with the District Court on July 13, 1967. Appeals were taken and jurisdictional statements filed jointly on behalf of these appellants and also on behalf of American Trucking Associations, Inc., et al., the American Waterways Operators, Inc., and the Interstate Commerce Commission. (Nos. 797, 804, 808 and 809) A Motion to Affirm was filed on behalf of appellee railroads and, most significantly, the Solicitor General filed a Memorandum For The United States which recites, in pertinent part, as follows:

> "The appeals present a major issue reserved by this Court in *Interstate Commerce Commission v. New York, New Haven & Hartford R.R. Co.*, 372 U.S. 744, 760-761 – Whether out-of-pocket costs, fully distributed costs, or 'some different measure' should be the criterion for determining which mode of transportation has the inherent advantage under Section 15a(3) and the National Transportation Policy. The obvious importance of the question to the future regulation of the Interstate Commerce Act and the National Transportation Policy suggests the appropriateness of plenary consideration. We therefore urge this Court to note probable jurisdiction." (Footnote omitted.)

By order entered January 15, 1967, this Court noted probable jurisdiction.

ARGUMENT

I.

Summary of Argument

There is here squarely presented for plenary judicial review the question of the *power* of the Interstate Commerce Commission under Section 15a(3) of that Act to carry out the mandate of the National Transportation Policy, expressly incorporated in that section, to, first, "recognize" and, thereafter, take appropriate action to "preserve" the "inher-

ent advantages" of each mode of transportation. This provision of the Act, added by the Transportation Act of 1958, was only recently – and it had been thought, definitively– construed by this Court, after exhaustive research into its legislative history, in *Interstate Commerce Commission v. New York, N. H. & H. R.R. Co., supra.*

In *New Haven* this Court expressly "left for initial resolution to the Commission's informed judgment" the task of determining how the required measurement or protection of inherent advantage should be accomplished in intermodal rate disputes like *Ingot Molds*. (372 U.S. at 370) Most significantly, nowhere did that opinion even imply that the Commission must keep "hands off" any proposed rate found to be compensatory,[1] with no power to either measure or protect demonstrated inherent advantage in such situations. That, however, is the holding of the District Court, in any event in what is there characterized as the "normal" situation.

In *Ingot Molds*, obviously chosen by the railroads to both test and "round out" the principles laid down in *New Haven*, the Commission expressly undertook to implement the guidelines provided for it in that case. As it happens the situation presented by the facts in *Ingot Molds* of a below-full-cost rail rate impinging upon a lower cost mode is precisely that which moved the Congress in enacting Section 15(a)(3) to reaffirm the power of the Commission to protect the inherent advantage of the lower cost mode. (372 U.S. at 758-59)

Despite the fact that the findings in *Ingot Molds* are on "all fours" with the "precise example given to the Senate Committee, which led to the language adopted", as this Court noted in pointing to the "power" of the Commission to prevent railroad impairment of the inherent advantages of other

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[1] The term "compensatory" is used herein to mean, as in the opinion below, any rate in excess of the relevant out-of-pocket cost of performing the service.

modes (372 U.S. at 758), the District Court, relying upon the same precedents, has come to a contrary conclusion as to the Commission's jurisdiction. The court below erroneously finds that the Commission's order is invalid for failure "to take adequate account of the Congressional intent that carriers should normally be free to offer rates which are compensatory, i.e., above relevant out-of-pocket costs." This holding, applied to the intermodal rate controversies which were the subject of Section 15a(3), would, by a sweeping – and ill-defined – judicial construction, legislate a restriction upon the Commission's powers that, for all practical purposes, restricts its function to mere railroad cost-finding.

The decision of the court below would render the Commission *powerless*, except in some abnormal situations left entirely undefined, to prohibit a reduced rate which is in excess of the proponent carrier's out-of-pocket or "incremental" costs, irrespective of which mode of transportation may be affirmatively found to possess the inherent advantage of lower cost, and without regard to the public interest in preserving such economic transportation service. Contrary to the holding by this Court in *New Haven* that the "initial resolution" of "how either carrier's inherent advantages should be measured or protected" is for the Commission, the opinion below deprives the Commission of even the right of that initial resolution. The lower court declares it beyond the power of that agency to either measure or protect where the proposed rate exceeds out-of-pocket costs. The fact that the lower court has held open the possibility that there may be "situations where the Commission has power" (App. 31-32) to prohibit reduced rates even though compensatory fails either to cure the error of statutory interpretation or to assure the preservation in the public interest of adequate transportation by all modes.

Ingot Molds is the typical situation contemplated by Congress in rejecting "the three shall nots" legislation sought by the railroads, and, in lieu thereof, imposing the restraints

of the National Transportation Policy upon the competitive freedom otherwise accorded by Section 15a(3). As this Court recognized in *New Haven* "the three shall nots", which it is conceded would have precluded any comparison of the proposed rail rate with those maintained by other modes, were "explicitly rejected" in committee. (372 U.S. at 754) Nowhere does the opinion of the District Court undertake to reconcile this Congressional rejection with its divergent views as to the Congressional intent. Certainly, had Congress intended to make compensativeness virtually akin to lawfulness, as the opinion below suggests, it would not have rejected "the three shall nots" and equivalent proposals in favor of the National Transportation Policy objectives in fact incorporated into Section 15a(3).

The change in the standards to be applied by the Commission in intermodal cases actually effected by Section 15a (3) was to require a showing of inherent advantage as a prerequisite to protection from destructive rate-making by another mode. The *New Automobiles* case (*New Automobiles in Interstate Commerce*, 259 I.C.C. 475 (1945)), upon which the District Court relies, stands only for the proposition that rates should not be disapproved *merely* because of their impact upon another mode, nothing more. In requiring that, henceforth, entitlement to protection be based upon a showing of inherent advantage, Congress did, indeed, legislate the *New Automobiles* principle, as suggested by the District Court, but, clearly, Commission action based upon *demonstrated* lower cost is not at odds with that principle. It is, thus, submitted that the statutory basis for the Commission's order herein is indisputably established by the legislative history of Section 15a(3) and the recent opinion of this Court in *New Haven*.

The question of the power of the Commission is, of course, different from the first ground for decision stated by the District Court, the asserted failure of the Commission to state a rational basis to support its selection of the fully-distributed cost comparison as the measure of intermodal

inherent advantage. Full cost is a standard that has frequently been employed by the Commission as well as by other agencies. It was urged as the appropriate measure in the *New Haven* case by the United States and expressly referred to by this Court as one of the methods which might be utilized by the Commission in its "initial resolution" of the problem of recognizing and preserving inherent advantage in a rail-water contest. In an effort to impugn the concept of fully-distributed costs the railroads presented extensive testimony by four economists in support of their contention that rates should be tested by out-of-pocket or so-called "incremental" costs. The Commission gave full consideration to this testimony and rejected these partial costs *for the purpose of measuring the inherent advantage of lower cost in intermodal controversies*. The Commission's report expressly incorporated the prior findings of Division 2 on this subject, which after discussing the railroads' incremental cost testimony, found that:

> "For carriers to remain in business constant costs must be recovered, which is to say that full costs in the aggregate must be obtained if the Nation's transportation system is to be healthy." (App. 40)

"The use of out-of-pocket or incremental costs" was expressly rejected as the measure of inherent advantage on the ground that this theory "ignores" the recognized "existence of constant costs". The principle that the cost advantages which are *inherent* in a particular form of carriage cannot validly be compared unless all costs of the enterprise are included in the equation, is so axiomatic that it should require little further elaboration.

The entire Commission, in turn, in its report, quoted from the Division's conclusion adhering to the full cost standard and stated "We agree." The basis for this conclusion is to be found in the Commission's prior reference to its conclusions in *Grain in Multiple-Car Shipments—River Crossings to So.*, 325 I.C.C. 752, 772 (1963). In the language there quoted from the *Grain* case, the Commission

had reaffirmed the use of full costs as the standard of inherent advantage in intermodal controversies.

Applying the full cost standard to the rates before it, the report went on to find, just as in the example used by this Court in *New Haven*, that the railroads' rate, below the full costs of the barge-truck mode, "unlawfully impinged" upon the latter's ability "to assert its inherent cost advantage" and would, if unchecked, "deprive shippers of cheaper water transportation." (App. 71) Certainly, this is the Commission's function under the National Transportation Policy. Moreover, in taking action, clearly the Commission followed the guidelines laid down by this Court in *New Haven*, most particularly in Footnotes 12 and 14. (372 U.S. at 760-61) The court below seems to have been persuaded by the argument of the appellees here that the Commission's reasoning should have been set forth in greater detail, but, assuredly, so long as the rationale is clearly expressed, the findings of an administrative agency need not be rendered *in extenso*.

Questions as to the interpretation of the opinion below, that is, whether it laid down a rigid rule of statutory interpretation or if not, the nature of the "situations" in which the Commission is empowered to act, need not here be resolved. The basic question of the lawfulness of the Commission's order here in issue is one which this Court can approach directly and independently, aided by its prior research of the same issues in *New Haven*. Judged in this manner, and measured against established principles of administrative law, the administrative expertise reflected in the "initial resolution" by the Commission in this proceeding should properly be sustained.

There can be no doubt that, in *Ingot Molds*, the railroads are seeking a license for a wholesale assault, through selective "incremental" rate-making, upon the traffic of competing modes of transportation. Admittedly, Congress intended that rail carriers should have greater freedom in pricing, but, at the same time, deemed it expedient to limit their manifest power to destroy other modes where the latter establish

their inherent advantage, most notably as in the utilization of a great natural resource such as the nation's waterways. The District Court has failed to appreciate that this is the very intermodal departure from the "normal" right of compensatory pricing with which Congress intended that the Commission be empowered to deal.

Congress has already defined the "situations where the Commission has power, under Section 15a(3) and the National Transportation Policy, to prohibit reduced rates even though they are compensatory" to which the opinion below referred. (App. 31) It is the situation that occurs, just as in *Ingot Molds*, when another mode claims *and proves* that it has the lower costs and that a competitor's otherwise "normal" compensatory rate would impair that inherent advantage. In such a situation the public interest in maximizing the use of natural resources and in preserving an adequate transportation system by all modes demands that the Commission do just what it did here – strike down the offending rate of the higher cost, more predatory, mode. The District Court has articulated no sound basis in law or fact for upsetting the Commission's discharge of its responsibilities under the National Transportation Policy by here taking such action.

II.

The District Court's Invalidation of the Commission's Order Rests upon a Misinterpretation of Section 15a(3) and of This Court's Opinion in *New Haven*

A. The Significance of the Statutory Issue Cannot Be Over Emphasized.

The three-judge District Court states two grounds for its conclusion to set aside the order of the Commission in the *Ingot Molds* case, "*first*, because it lacks a rational basis and thus is arbitrary and, *second*, because it is inconsistent with the objectives and purposes of Congress in enacting Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. sec. 15a

(3) (App. 34), and thus is not in accordance with law." (App. 17) The first stated ground is, hence, more one of articulation than principle, and presents the conventional issues invariably raised upon judicial review of agency decisions. It will be demonstrated hereinafter that the Commission's report is not defective as lacking a rational basis, however, the fundamental overriding importance of the second stated ground of decision requires that the issue of the Commission's powers under Section 15a(3) be given primary consideration upon this appeal. Upon the resolution of this issue depends not only the future course of the regulation of intermodal competition, as the Memorandum For The United States points out (p. 4), but, also, it is submitted, from the standpoint of the barge lines in any event, the very existence of effective competitive transportation service.

In their Jurisdictional Statement, these appellants, seeking to stress the importance of reconstituting the Commission's powers under Section 15a(3), characterized this appeal as a "sequel" to the *New Haven* case. (J.S. p. 7) To the same effect the opinion below, after quoting from *New Haven* this Court's recital of the questions said there to be left to the Commission for "initial resolution" stated:

> "This is the first case following *New Haven* in which a court has been called upon to review a determination by the Commission of how the inherent advantage of competing modes of transportation should be recognized or preserved." (App. 18)

The appellee railroads, in their Motion to Affirm herein, likewise observe that the Commission here had "squarely before it" the "important questions" left in *New Haven* " how the inherent advantages of competing transporta modes should be recognized and preserved when judging the reasonableness and lawfulness of reduced intermode competitive pricing." (Motion, p. 11) The Solicitor General in the Memorandum For The United States noted that the appeals herein present a major issue reserved by this Court in *New Haven*. i.e.,

> "whether out-of-pocket costs, fully distributed costs, or 'some different measure' should be the criterion for determining which mode of transportation has the inherent advantage under Section 15a(3) and the National Transportation Policy." (p. 3-4)

Clearly, therefore, there is general agreement that the opinion of this Court in *New Haven* represents the point of departure in this case. The Commission likewise recognized the significance of *New Haven* and undertook the tasks left to it for "initial resolution" in the light of the comprehensive guidelines there provided by this Court. The opinion below would preclude the completion of these statutory duties.

The District Court, misconstruing *New Haven* and the legislative history of Section 15a(3) there clearly enunciated, has, by judicial interpretation, injected a rigidity of regulatory policy not intended by Congress and entirely alien to the flexibility of administrative process. In so doing it will make possible destruction of the very inherent advantage of water transportation that Section 15a(3) undertook to preserve. Passing for the moment the question of the clarity of the exposition of its selection of fully-distributed costs as the measure of inherent advantage, the Commission did undertake *to resolve* the issue expressly reserved in *New Haven*; the District Court, on the other hand, erroneously holds *as a matter of law* that out-of-pocket costs are ultimate criterion of a lawful rate and, hence, that "normally" there is no such issue to be resolved. In this, the opinion below clearly misconstrues the statute as spelled out by this Court in *New Haven*. Obviously, if this were the rule of law then this Court in *New Haven*, in the very example there employed, actually left nothing for the Commission to decide. It seems apparent that the District Court failed completely to understand the statement by this Court (372 U.S. 758) that

> "The principal reason for this reference, (to the policy) as the hearings show, was to emphasize the power of the Commission to prevent the railroads

> from destroying or impairing the inherent advantages of other modes. And the precise example given to the Senate Committee, which led to the language adopted, was a case in which the railroads by establishing on a part of their operations a compensatory rate below their fully distributed cost, forced a smaller competing lower cost mode to go below its own fully distributed cost and thus perhaps to go out of business." (First emphasis is by the Court.)

It seems equally apparent that the strained construction advanced by the District Court stems in large measure from its failure to appreciate the true nature of the regulatory change accomplished by Section 15a(3).

B. The Change Wrought by Section 15a(3) Was from Mere Need for Intermodal Protection to Entitlement Based upon *Demonstrated* Inherent Advantage.

The historic and legislative background of Section 15a(3) not only clarifies the change in intermodal regulation that it in fact accomplished, but also makes abundantly clear *what it did not do*. The history of that section does not compel the conclusion that the Commission must sanction all compensatory rates, as suggested by the District Court. This Court has fully and fairly recited that background in *New Haven*, but it is deserving of repetition since it points up wherein the District Court went astray in the opinion below.

At the outset, appellants hasten to acknowledge that Congress, in promulgating Section 15a(3), did, indeed, work a change in certain of the regulatory policies theretofore applied by the Commission. It is here further conceded that the change was favorable to the railroads and in the direction of greater freedom of competitive pricing. But it did not go as far as the railroads then desired nor as far as the opinion below now concludes. Congress did not there turn the railroads loose upon their competitors without providing the counterbalancing restraint of Commission surveillance and jurisdiction, keeping constantly in mind the stake of the

shipping public in traditionally cheaper water transportation. To the contrary, it expressly rejected the "carte blanche" rate-making that the District Court would now confer upon appellees.

The change in fact wrought by Section 15a(3) – and, it is submitted, the only change – is clearly discernible and simply stated. The Commission, which admittedly had earlier vacillated between two divergent policies in intermodal rate controversies, was directed to adhere to that which based entitlement to protection upon merit rather than mere need. Prior to the enactment of Section 15a(3) in 1958, the Commission had frequently – but not invariably – restricted the ability of railroads to compete with other modes through rate reductions because of the anticipated impact of probable traffic diversion upon the services of the other mode. The barge lines were often accorded protection against railroad rate reductions and enabled to retain a "fair share" of the particular traffic by demonstrating nothing more than a *need* that rail rates be maintained differentially higher than those by water, if carriers by the latter mode were to attract any reasonable volume of traffic. *Sugar to Ohio River Crossings*, 296 I.C.C. 121 (1955), is illustrative of this line of cases in which reduced railroad rates were ordered canceled *without any consideration of which mode was the more economic in handling the involved traffic.*

During the same pre-1958 era, however, the Commission had also and earlier decided *New Automobiles in Interstate Commerce*, supra, discussed in *New Haven* and relied upon by the District Court in the second stated ground for decision below. In *New Automobiles*, in contrast to the "fair share of the traffic" or need for rate differential line of cases typified by *Sugar*, the Commission had equated intermodal competitive rate-making to demonstrated greater superiority and had declined to take action to allocate traffic upon the basis of need for a differential. This was a general investigation of rates and practices relating to the transportation of new automobiles by rail and motor carrier and, when in conjunction with one of the other two modes, by water car-

ier as well. The motor carriers asked the Commission "to lay down the principle that in meeting highway competition the railroads should in no instance go below the fully-distributed rail costs or the truck rates." (259 I.C.C. at 530) The railroads, on the other hand, asked for freedom to meet competition by reduced rates so long as out-of-pocket costs were met.

The Commission in *New Automobiles* undertook a comparison of carrier costs and found most rates to be compensatory. It denied a rate "umbrella" to the motor carriers for movements over 200 miles, finding that the rate parity sought by those carriers would "bring them much more of the long-haul traffic, although for such distances *they are least fit from a cost standpoint*." (254 I.C.C. at 539) (Emphasis supplied) As the United States emphasized in its Reply brief below, clearly in *New Automobiles* the Commission determined "the relative fitness of the various agencies of transportation" measured by cost. (p. 12) Based upon its findings, in the statement for which *New Automobiles* is most frequently cited, the Commission said:

> As Congress enacted separately stated rate-making rules for each transport agency it obviously intended that the rates of each such agency should be determined by us in each case according to the facts and circumstances attending the movement of the traffic by that agency. In other words, *there appears to be no warrant for believing that rail rates, for example, should be held up to a particular level to preserve a motor-rate structure, or vice versa.* (Emphasis added) App. 14, par. 3.

This is the language quoted by the District Court (App. 25) but, we submit that it does not lead to the result suggested in the opinion below. Certainly, *New Automobiles* does not stand for the proposition that compensatory rates are *per se* lawful (except in some vague "situations") as the lower court found. Moreover, even if it did, Congress did not so understand it, and obviously, the legislative history of Section 15a(3) is filled out by what was understood by Congress to be the principle of *New Automobiles*.

The District Court accurately related the role of *New Automobiles* in the enactment of Section 15a(3) but failed to grasp its significance. Thus, the opinion below states:

> "We do not think there can be any doubt that the underlying purpose of Congress in enacting Section 15a(3) was to direct the Interstate Commerce Commission to observe the original intent of Congress in 1940 and to restore and adhere to the policy set forth in *New Automobiles* with respect to the preservation of inherent advantages."

Having thus recognized that the policy of *New Automobiles* relates "to the preservation of inherent advantages," it is impossible to reconcile the District Court's ultimate conclusion that "Thus, in *New Automobiles*, the Commission indicated its understanding that Congress intended that carriers should normally be free to offer rates which were compensatory." Manifestly, where, as here, the "normal" freedom (where no issue of intermodal inherent advantage has been raised) to offer compensatory rates comes into direct conflict with the public policy aimed at preservation of intermodal inherent advantages the former must give way to the latter in accordance with the specific directive of Section 15a(3).

The fact that Congress understood the policy of *New Automobiles* to permit the assertion of inherent advantage (there referred to as the relative fitness of the various modes measured by cost) through competitive rate-making, as contrasted to the highly criticized line of protectionist decisions by the Commission, is made clear by the legislative history, including the very portions of the Senate Report quoted in the footnote to the discussion by the District Court in the opinion below, indicating that *New Automobiles* was understood to stand for *the right to assert inherent advantages*. (App. 26-27) The House Report is to the same effect. H. Rep. No. 1922, 85th Cong., 2d Sess., p. 14. Similarly, the Report of the Senate Committee on Interstate and Foreign Commerce described Section 15a(3) as "designed to encourage competition . . . by allowing each form of transportation . . .

full opportunity to make rates reflecting the inherent advantages each has to offer . . ." and went on to observe that such rate-making would be regulated by the Commission "to prevent unfair or destructive competitive practices as contemplated by the declaration of national transportation policy." (S. Rep. No. 1647, p. 3.)

It seems indisputable, therefore, as this Court recognized in *New Haven*, that Section 15a(3) was intended to eliminate "paternalism" and the role of the Commission as a "giant handicapper" and to substitute merit for need, demonstrated greater "relative fitness" for a "fair share" allocation of the market, and inherent advantage for competitive rate differential. Simply stated, therefore, the Congress, reaffirming the *New Automobiles* principle, said to the Commission in effect, henceforth, you may not arbitrarily "hamstring" the superior agency of transportation. In no respect, however, did the Congress deprive the Commission of the power to determine which carrier is the more fit and to take appropriate action where needed, to protect such inherent advantage from destructive competition. Indeed, the express incorporation of the National Transportation Policy in Section 15a(3), following the rejection of earlier more rail-oriented versions, enjoins the Commission to assume just that responsibility.

C. The District Court's Interpretation of Section 15a(3) Amounts to Enactment of "The Three Shall Nots" Previously "Explicitly Rejected" by the Congress.

The nature of the change in fact accomplished by Section 15a(3), from "fair share" allocation of traffic among the modes to a showing of inherent advantage as a condition precedent to invocation of the Commission's powers in intermodal controversies, is confirmed by the then proposed legislation which the Congress *did not* enact. This Court in *New Haven* discussed and recognized the significance of the legislation endorsed by the railroads, known as "the three shall nots". As originally recommended by the Secretary of

Commerce this draft legislation would have amended Section 15a(1) of the Act to provide that, in determining whether a rate is less than a reasonable minimum, the Commission

> "shall not consider the effect of such charge on the traffic of any other mode of transportation; or the relation of such charge to the charge of any other mode of transportation, or whether such charge is lower than necessary to meet competition of any other mode of transportation." (372 U.S. at 753-54)

Appellants here recognize that had "the three shall nots" received the approval of Congress they would have effectively ruled out any consideration by the Commission of the impact of the reduced rail rate upon water transportation, whatever advantages the latter might offer to the shipping public. Just as the District Court now holds, based upon its interpretation of Section 15a(3), "the three shall nots", vigorously advocated by the railroad industry, would have required the Commission in an intermodal controversy to approve any rail rate above out-of-pocket costs irrespective of its impact upon the inherent advantages of other forms of transportation.

As this Court observed in *New Haven*, the Commission and other carriers expressed vigorous opposition to the bill in this form. "When after hearings, a Senate Subcommittee recommended a bill to its parent committee, it *explicitly rejected* the three 'shall nots'." (372 U.S. at 754) (Emphasis supplied) It would seem clear, therefore, that if, as the District Court now holds "Congress has expressed a clear intent that reduced compensatory rates should normally be allowed. . . ." (App. 31-32), what better way to have made such an intent indisputably clear than by enactment of "the three shall nots"? The situation of a rail-water struggle and of the precise rate-cost relationship involved in *Ingot Molds*, provided the very context within which the Congress chose to reject the single mode standard embodied in the railroad supported "three shall nots", in favor of a standard of relative advantage calling upon the Commission to both measure

and, thereafter, if need be, protect the demonstrated lower cost form of transportation. Manifestly, Congress did not intend to leave the water carrier "family" entirely "defenseless" against below-full-cost rail rates as the lower court here concludes. To the contrary, as this Court likewise observed in the *New Haven* opinion, the Senate Subcommittee that had rejected "the three shall nots" had "expressed its concern with 'overregulation' and emphasized that its own proposal to add a new § 15a(3) was designed to encourage competition among the different modes and to permit each mode to assert its *inherent advantages*." (372 U.S. 754) (Emphasis by the Court)

Repeated use of the word "assert" in the legislative history indicates that the Senate Subcommittee obviously contemplated that each mode would be enabled to take affirmative action to both exploit its advantages and protect its traffic against diversion to other modes where it could satisfy the condition precedent of demonstrated superiority. The subsequent Senate Report reiterating and emphasizing the "import" of the Senate Subcommittee report quoted the following from the latter report:

> It nevertheless appears that the Interstate Commerce Commission has not been consistent in the past in allowing one or another of the several modes of transportation to assert their inherent advantages in the making of rates. The subcommittee recommends, therefore, that the Commission consistently follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of service or of cost. In 1945 in New Autobiles in Interstate Commerce (259 ICC 475), the subcommittee believes that the Commission properly construed the intent of Congress in this respect when it said:
>
> > 'As Congress enacted separately stated rate-making rules for each transport agency, it obviously intended that the rates of each such agency should be determined by us in each case according to the facts and circumstances attending the movement

> of traffic by that agency. In other words, there appears no warrant for believing that rail rates, for example, should be held up to a particular level to preserve a motor-rate structure, or vice versa (259 I.C.C. at p. 238).
>
> The subcommittee wishes to affirm the interpretation of the Commission given in the Automobile case epitomized in the words quoted above. The subcommittee therefore believes it necessary to amend the act only so as, in effect, to admonish the Commission to be consistent in following the policy enunciated in the Automobile case thus assuring reasonable freedom in the making of competitive rates. * * *
>
> The subcommittee anticipates that the broad effect of this amendment will be to encourage competition between the different modes of transportation to the benefits of the shipping public. * * * S. Rep. No. 1647, 85th Cong., 2d Sess., pp. 2-3.

The foregoing extract makes it abundantly clear that Congress intended to legislate - and understood *New Automobiles* to represent - "the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of service or of cost." Obviously, no such assertion is possible, in any event in the "normal" situation, under the ruling of the lower court here, which would preclude the Commission from protecting the inherent advantage of the barge-truck route against impairment.

The ensuing legislative history cannot be better summarized than it was by this Court in *New Haven* (372 U.S. 754-58). As there pointed out "the bill at this stage" provided that the Commission, in determining whether a rail rate protested by another mode is lower than a reasonable minimum, should consider the movement of traffic by railroad "and not by such other mode." Appellants must again concede, just as was true of "the three shall nots", that the District Court's declaration that compensatory rates, even where shown to adversely affect a more advantageous form of transportation, must be nevertheless approved by the Com-

mission, would apply to *Ingot Molds* had "the bill at this stage" been adopted. But Congress did not enact Section 15a(3) in this form. It was pointed out by the Commission through its Chairman in the hearings before the full Senate Committee, as this Court indicated in *New Haven*, that the then proposed 15a(3) with the "and not by such other mode" proviso attached was "substantially equivalent to the three 'shall nots'." (372 U.S. 754) The ensuing discussion by this Court in *New Haven* is particularly significant and we take the liberty of here quoting from it at some length because we deem it dispositive of the issue of statutory interpretation presented in this proceeding:

> ". . . In particularly Commissioner (then Chairman) Freas expressed concern that if the Commission were foreclosed from considering the effect of a rate on a competing mode, it would be powerless to reject a railroad rate which covered the railroad's out-of-pocket costs, even if that rate had the effect of destroying the inherent advantages of a lower-cost carrier. He stated:
>
> > " 'Whenever conditions permit, given transportation should return the full cost of performing carrier service . . . . In many instances, however, the full cost of the low-cost form of transportation exceeds the out-of-pocket cost of another, If, then, we are required to accept the rates of the high cost carrier merely because they exceed its out-of-pocket costs, we see no way of preserving the inherent advantages of the low cost carrier.' Id. at 168.
>
> "Commissioner Freas made it clear that the Commission believed the railroads should be permitted to assert their inherent advantages too, id., at 172, and suggested that any proposal specifically authorize the Commission to give 'due consideration to the inherent cost and service advantages of the respective carriers,' id., at 169. In further discussion, it was indicated that it would be inconsistent with the National Transportation Policy to permit destruction of the inherent advantages of any mode of transpor-

tation, id., at 170, 171, 177, and when Senator Potter suggested the deletion of the phrase 'and not by such other mode' and the addition of a reference to the National Transportation Policy, Chairman Freas answered: 'We will buy Senator Potter's suggestion.' Id. at 177, 178. Senator Potter's suggestion was adopted in the final version of the bill."

* * *

"This revealing legislative history fills out the contours of section 15a(3). There can be no doubt that the purpose of this provision was to permit the railroads to respond to competition by asserting whatever inherent advantages of cost and service they possessed. The Commission, in the view of the proponents of the bill, had thwarted effective competition by insisting that each form of transportation subject to its jurisdiction must remain viable at all costs and must therefore receive a significant share of the traffic. It had, in the words of one Congressman, become a 'giant handicapper.'

"Moreover, it is clear that Congress did not consciously or inadvertently defeat this purpose when it included in section 15a(3) a reference to the National Transportation Policy. The principle reason for this reference, as the hearings show, was to emphasize the power of the Commission to prevent the railroads from destroying or impairing the inherent advantages of other modes. And the precise example given to the Senate Committee, which led to the language adopted, was a case in which the railroads, by establishing on a part of their operations a compensatory rate below their fully distributed costs, forced a smaller competing *lower cost* mode to go below its own fully distributed cost and thus perhaps to go out of business." (372 U.S. 754-55, 757-58) (Emphasis by the Court)

It must be abundantly clear that the opinion below, dealing in *Ingot Molds* with the "precise example given to the Senate Committee" completely nullifies the intended "power of

the Commission to prevent the railroads from destroying or impairing the inherent advantages of other modes." In thus interpreting Section 15a(3) the District Court has pursued a line of reasoning that is 180 degrees contrary to the "principal reason" for the reference in that provision to the National Transportation Policy which, as this Court pointed out, was to "emphasize the power" of the Commission in such circumstances. If, as the District Court concludes, Congress in fact intended "that carriers should normally be free to offer rates which are compensatory, i.e., above relevant out-of-pocket costs." (App. 31), even in the "case in which the railroads, by establishing on a part of their operations a compensatory rate below their fully distributed costs, forced a smaller competing *lower cost* mode to go below its own fully distributed cost and thus perhaps to go out of business", then, it must follow that Congress performed a totally meaningless act in rejecting "the three shall nots" and equivalent language and, in lieu thereof, enjoining the Commission to give "due consideration to the objectives of the National Transportation Policy declared in this Act." Certainly, the District Court has erred in, by implication, attributing such illogical action to the Congress.

D. The District Court's Misinterpretation of Section 15a(3) Is Not Cured by the Reservation of Commission Jurisdiction in Unidentified 'Situations'.

It has previously been pointed out herein that the opinion below, in the Court's second stated ground for decision, "carves out" some areas, left entirely undefined, for the exercise by the Commission of the power otherwise denied it to cancel a rate in excess of out-of-pocket costs. Thus, it is said that "the Commission failed to take adequate account of the Congressional intent that carriers should *normally* be free to offer rates which are compensatory, i.e., above relevant out-of-pocket costs." (App. 31) (Emphasis supplied) And again at the same page in the concluding portions of the opinion below the District Court reiterating the same construction of Section 15a(3) concludes as follows:

> "We do not mean to suggest that their may not be *situations* where the Commission has power, under Section 15a(3) and the National Transportation Policy, to prohibit reduced rates even though they are compensatory. What we do suggest is that Congress has expressed a clear intent that reduced compensatory rates should normally be allowed and that the record here and the Commission's report supply no basis for disregarding that intent." (App. 31) (emphasis supplied)

Attention is directed to the fact that the above-quoted penultimate paragraph represents the only reference by the District Court to possible Commission authority in special circumstances. Reserving for later discussion herein the question of the rationale of the Commission's action, it is noteworthy at this point to observe that the lower court apparently contemplates that the Commission *does* possess the statutory power to prohibit a compensatory rate under *some* circumstances. Even more significantly, the District Court attributes to the Congress, as a matter of statutory construction, the distinction between "situations", entirely vague but presumably unusual, in which the Commission has power to take action just like that which it took in *Ingot Molds*, and other situations (allegedly "normal") in which that Court has ruled that such power is lacking.

It must be obvious, simply as a matter of initial reaction to such an interpretation, that, were it sound, Congress has supplied no standards whatsoever as to when the Commission may act or when it is powerless to act. Neither does the opinion below provide any clarification as to what the District Court conceives to be the Congressional intent and policy in this respect. Lacking statutory standards, the transportation industry by all modes would be consigned to uncertainty and chaos and the duty of the Commission to promote a sound transportation system would become a virtual nullity. We submit that the powers of administrative agencies are not so nebulously defined. A proper interpretation of Section 15a(3) establishes that the Congress

did not intend to leave the Commission entirely "rudderless", in dealing with intermodal problems, with no standards to govern its exercise or, indeed, possession, of the power to take appropriate action to promote the objectives of the National Transportation Policy embodied in Section 15a(3).

The court below has itself been inconsistent in arriving at the strained and ineffectual interpretation of Section 15a (3) quoted above. For example, it states, referring to the question of "the relative efficiency of the competing carriers in carrying this traffic" that "This question is one of great importance in view of the Commission's obligation, declared in the National Transportation Policy and the rate-making provisions of the Act, to promote efficient and economical use of transportation resources and the establishment of rates which are as low as possible." (App. 19) Under the District Court's view of its powers it is difficult to see how the Commission can carry out the "obligation * * * to promote efficient and economical use of transportation resources" if a higher cost mode must be permitted to take rate action which impairs the ability of the lower cost mode to assert that inherent advantage.

Even more difficult of reconciliation with its conclusion is the District Court's entirely accurate recital of the finding of this Court in *New Haven.* Referring to that decision the opinion below states: "The Court also said that a reduced compensatory rate should not be found unlawful *unless this is necessary to preserve the inherent advantages of a competing mode.*" (372 U.S. at 758). (App. 23) (Emphasis supplied) Clearly this summary of the *New Haven* holding, in which we concur, is a "far cry" from the District Court's ultimate conclusion that "normally" the Commission has no power to prohibit a compensatory rate, assuming, *arguendo,* the validity of the Commission's finding that the rail rate on ingot molds was required to be cancelled for the very reason that such action was found "necessary to preserve the inherent advantages of a competing mode."

It must be clear that the foregoing *New Haven* principle, to which the District Court paid only "lip service", reflects the actual Congressional intent rather than the vague one of "on again - off again" power, dependent upon undefined "situations," provided by the lower court. Clearly, that court erred materially in failing to implement the statutory policy which the court itself recognized to be unmistakably defined in *New Haven*.

Railroad appellees, understandably apprehensive about the drastic curtailment of the Commission's powers accomplished in one fell swoop by the District Court, comment in their Motion to Affirm that it is "simply not so" as appellants are said to claim "that the lower court has laid down a rigid rule of law which deprives the Commission of its jurisdiction with respect to the recognition and preservation of the inherent advantages of lower costs." (Motion, p. 5). They then go on to assert, with obvious heavy and newfound reliance upon the word "normally", that "normally Section 15a(3) requires the Commission not to interfere with reduced rates which are compensatory and beneficial to the proponent mode" (the latter test was not imposed by the Court below) except "if the Commission articulates a rational basis for doing so." (Motion, pp. 5 and 6). Appellees' embellishments upon the ruling below, of course, attempt to soften the harshness of the District Court's opinion.

It is clear from the foregoing that the railroads, upon reading the opinion below, have no more idea than these appellants of what "situations" confer jurisdiction upon the Commission and what standards are to be applied in any such "situations." To dispose immediately of the irrelevant "straw man" that appellees upon motion seek to set up in order to place these appellants in an extreme posture, it should be made abundantly clear that we do not attribute to the District Court a "rigid rule of law." To the contrary, we confess complete ignorance as to what rule of law is there laid down for the determination of those "situations"

which confer power upon the Commission, said by the court below "normally" to be lacking. It is here further submitted the absence of both jurisdictional clarity and policy standards for the Commission's guidance under the lower court's interpretation of Section 15a(3) is itself demonstrative of the invalidity of that statutory analysis.

In the instant proceeding, however, it is further submitted that this Court need not concern itself with the "rigidity" or, alternatively, as we suggest, vagueness, of a rule of law for application in undefined extraordinary circumstances because the situation here is entirely "normal". This is the very intermodal competitive case of a rail rate fixed at a below full cost level identical with the barge-truck charges impinging upon the lower cost mode of transportation that the Congress had in mind in conferring upon the Commission in Section 15a(3) the power to carry out the objectives of the National Transportation Policy by prohibiting a reduced rate otherwise lawful. Whatever the rule of law in undefined special "situations", the opinion below is entirely clear and 100% rigid in denying to the Commission the power to prevent impairment of inherent advantage in the typically "normal" and, hence, vastly more important intermodal rate controversy found in *Ingot Molds.*

In this connection it might be added that we read the opinion below just as does the United States. The footnote at page 4 of the Memorandum For The United States herein states as follows:

> "[1] Although the district court's first ground of decision does not reach this question, it is necessarily presented because the second ground—that the Commission misinterpreted or misapplied the relevant statutory provisions—prohibits the Commission, except in extraordinary situations, from using fully distributed costs as the criterion for determining inherent advantage between competing modes."

There can, accordingly, be no disagreement that the District Court has effectively foreclosed one of the possible measures

of inherent advantage—full costs—expressly left to the Commission for "initial resolution" in *New Haven.*

By way of further comment it may be speculated, admittedly without clues in the opinion below, that the District Court's reference to special situations for the exercise of the Commission's power was intended to correspond to the discussion by this court in *New Haven.* Reference is made in the concluding section of the *New Haven* opinion to the needs of commerce and the national defense as constituting an "operative policy" which might warrant special consideration by the Commission. This Court there made it clear, we believe, that under such extraordinary circumstances, the Commission might override "either the more particularized mandates of the National Transportation Policy or the clear Congressional design embodied in § 15a(3)." (372 U.S. at 762)

Such special considerations, this Court noted, once raised in an intermodal controversy, must be evaluated just "like the factor of inherent advantage" and "do not exist solely for the benefit of protesting carriers." (372 U.S. at 764). In effect, therefore, as *New Haven* makes clear, the true "normal" situation in an intermodal controversy is for the Commission to recognize and preserve any demonstrated inherent advantages, whereas, "under extraordinary circumstances", with specific findings, the Commission might even deny to the mode possessing the inherent advantage the right to assert that advantage. Manifestly, the clearly defined special exception to the general intermodal application of Section 15a(3) involving the needs of commerce or the national defense, recited in *New Haven,* does not contemplate that the Act be so interpreted as to preclude the Commission from recognizing and preserving inherent advantage in *every* case.

E. The Normal Rule in Intermodal Cases When the Issue Is Raised Is Not Compensatoriness but Assertion of Inherent Advantage.

The foregoing analysis of the legislative history and the opinion of this Court in *New Haven,* both of which are relied upon in the opinion below, compels the conclusion that the District Court based its statutory finding upon a misunderstanding as to the "normal" situation to which Congress was there addressing itself. The lower court, as previously indicated, finds that Congress intended "that reduced compensatory rates should normally be allowed." (App. 31-32) As a general proposition, *where no inherent advantage is threatened,* appellants are prepared to concede that the lower court was entirely correct.

The *Ingot Molds case,* however, did not present a "normal" situation in this sense. The court's difficulty arose from applying that general rule whereby only improvident rates are beyond the scope of managerial discretion to an intermodal controversy, which placed directly in issue the question of whether the general right to publish a rate measured by out-of-pocket costs should give way to the public policy reflected in the National Transportation Policy and expressly incorporated into Section 15a(3). Once the intermodal issue is raised by a competitor's claim of entitlement to protection against the reduced rate, we submit that the *initial inquiry* is not the purely mechanical measurement of the proposed rate against the proponent's out-of-pocket costs, but rather the relative measurement, by use of an appropriate standard, of which mode possesses and is, hence, entitled to "assert", the inherent advantage of lower cost.

The footnotes appended by this Court to its opinion in *New Haven* are particularly pertinent to this discussion. Footnote 12 (372 U.S. at 760), referring to the measurement or protection of inherent advantage, states as follows:

> "[12] It was argued below, and at least intimated here, that the railroads had failed to sustain the burden of proving that they had the relative cost advantage.

> But we agree with the court below that if a carrier shows a proposed rate to be just and reasonable from the standpoint of its own revenue requirements, it is for a protesting carrier who relies on a claim of inherent cost advantage to bear the burden of persuading the Commission of the existence of that advantage. Of course, when such an issue is raised, each carrier should bring forward the data relating to its own costs that are required for resolution of the issue. See various Commodities from or to Ark. and Tex., 314 I.C.C. 215."

Clearly this Court recognized above that the "normal" situation, wherein "a carrier shows a proposed rate to be just and reasonable *from the standpoint of its own revenue requirements*" (emphasis supplied), is non existent when a competing mode raises the issue and assumes the burden of proving that it possesses an inherent cost advantage. Under the District Court's contrary interpretation of Section 15a (3), once the railroads have accomplished the first step in Footnote 12 by showing the rate to be compensatory, there is no "issue" remaining for resolution by the Commission. Patently, the lower court is in error in confusing the "run-of-the-mill" situation of a rate proposal lacking any intermodal competitive impact, with the typical and normal competitive situation that was the particular subject of Section 15a(3), i.e., an intermodal rate controversy placing directly in issue conflicting claims of inherent advantage.

Footnote 13 appended to the *New Haven* decision (372 U.S. at 760) likewise spells out the foregoing distinction which we suggest the District Court failed to appreciate. This Court said there:

> "[13] The utility of the concepts of fully distributed and out-of-pocket costs may be limited to the area in which they have tradionally been used—that of determining the reasonableness of a rate from the standpoint of a carrier's own revenue requirements. If so, some different measure may be preferred for comparing the costs of two or more modes of transportation."

Plainly, as this Court there observed, the standards of lawfulness where the test is mere compensatoriness, and those when the measure is inherent advantage, are not necessarily the same. Congress frequently has seen fit to prescribe varying standards in the Act, for example Section 4 requires that rates proposed thereunder be "reasonably compensatory", interpreted to require something more than mere coverage of "bare-bones" out-of-pocket costs. The Commission in using fully distributed costs as the measure of inherent advantage was not dealing with the situation in which out-of-pocket costs represent the "normal" measure of reasonableness "from the standpoint of a carrier's own revenue requirements". Rather, it was dealing and we shall hereinafter demonstrate, dealing reasonably, with the fundamental and primary issue in an intermodal controversy of determining wherein lies the inherent advantage, if any, of lower cost.

To summarize, therefore, it is our position that Section 15a(3) was intended to apply specifically to intermodal rate controversies such as are present in and typified by *Ingot Molds*. Where no issue of inherent advantage has been raised by a competing mode the District Court is correct, although wide of the target, that Congress intended to leave the carriers free to publish lawful rates which, *by interpretation of the provisions of the Act* (e.g. Sections 1(4) and (5) and 15(7), have been held to be those at a compensatory level. That, however, is not the *Ingot Molds case*. On the other hand where, as here, just as in this Court's Footnote 12 in *New Haven*, a protesting carrier by another mode raises an issue of inherent advantage, we urge that the District Court has erred in holding the Commission to be powerless to resolve that issue.

To the contrary, if the Commission is to carry out the objectives of the National Transportation Policy it must be empowered to utilize its administrative expertise in that endeavor. There is no reason to here require that it apply a standard developed for the distinct purpose of judging

whether a rate is compensatory. The primary inquiries under Section 15a(3) are to first determine, i.e., recognize, the existence of an inherent advantage and, thereafter, if required in the public interest, protect, i.e., preserve, that advantage. At this point in the administrative process the lower cost or inherent advantage mode becomes the ratemaker in the sense that it is entitled to be protected against rate action by other modes which the Commission finds will impair the former's inherent advantage. Had the railroads here been found to be the inherent advantage mode of transportation, that is, by the standard applied by the Commission, had they established the lower-fully distributed costs, they might then have elected to reduce their rates below that level. But where, as here, the barge-truck service was found to possess the inherent advantage, upon the requisite showing of adverse impact, it was entitled to protection against the rail reduction irrespective of the fact that the reduced rail rate, measured by standards applicable in other than intermodal competitive situations, may have complied with the requirements of law.

Congress recognized, in the examples twice recited by this Court in *New Haven*, that a compensatory rail rate below the rails' fully distributed costs might force a smaller competing lower cost mode to go below its own fully distributed cost and thus perhaps go out of business. It was the express purpose of the reference to the National Transportation Policy in 15a(3) to emphasize the power of the Commission to prevent the railroads from destroying or impairing the inherent advantages of other modes in just such a situation. The erroenous interpretation of that section by the District Court in the opinion below would improperly deprive the Commission of such power in the very circumstances most feared by Congress. Moreover, the *assertion* of inherent advantage that it was the Congressional purpose to assure—for all modes—is not fostered, but, rather, impeded, by the second stated ground of the District Court, which we urge this Court to unequivocally reverse.

III.

The District Court Erred in Finding the Commission's Order To Be Without a Rational Basis.

A. The Commission's Reports Together Clearly, If Succinctly, Reject Incremental Costing for Failure To Reflect Constant Costs.

In the foregoing discussion of the Commission's power under Section 15a(3) to prohibit a reduced, compensatory, rail rate in order to preserve the demonstrated inherent advantage of a competing mode, we have necessarily deferred consideration of the Commission's findings in implementation of what it conceived to be its functions under that provision of the Act. In what is actually the first stated ground for decision the court below "concluded that the Commission's order must be set aside . . . because it lacks a rational basis and thus is arbitrary. . . ." (App. 17)

The District Court's reasoning in reaching this conclusion is set forth in the ensuing pages of the opinion (App. 18-25) where it is made clear that the court had particular reference to the Commission's adoption of fully-distributed costs as the measure of relative rail-water inherent advantage. Thus, the opinion below holds, apparently assuming, *arguendo*, the power of the Commission to employ some standard and make some determination of inherent advantage, "that the Commission has failed to state a rational basis to support its conclusion that the 'fully distributed' costs of the two competing modes must be compared to determine which mode has an inherent cost advantage." (App. 18)[2]

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[2]It is interesting to note that the railroads, which now, of course, adopt the District Court's construction of 15a(3), heretofore devoted their primary efforts, not towards, disputing the Commission's power, but rather towards urging "incremental" costs as the standard in exercising that power. As recently as the oral argument before the Dis-

Appellants certainly concede that the decisions of an administrative agency must reflect its consideration of the pertinent evidence and principal issues sufficiently to eliminate any doubt as to the basis for its decision. We submit that this Court will find upon independent evaluation of the Commission's decision herein that it conforms to these fundamental requirements of administrative due process. The Commission was well aware that the *Ingot Molds* proceeding was launched to provide finalization of the intermodal issues first before this Court in *New Haven.* There, consistently with the Congressional purpose in enacting Section 15a(3), pure protectionism, without the evidence necessary for a finding of inherent advantage, was set aside as a reversion to the Commission's pre-1958 "handicapper" policy. The water carrier costs necessary to a comparison with rail costs and consequent measurement of the inherent advantage of lower cost, were lacking in *New Haven.*

In *Ingot Molds,* however, the missing cost elements were supplied and the Commission made specific findings as to both rail and water carrier costs which are not here disputed. In dealing with the evidence the Commission made it indisputably clear, through frequent reference to the *New Haven* decision, that it was there undertaking to follow the guidelines laid down by this Court and to formulate the "initial resolution" of the issue of inherent advantage delegated to it in that opinion. It did so, as we have previously emphasized, in the precise factual situation of a railroad establishing

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trict Court, railroad counsel, after referring to *New Haven* in emphasis of the Commission's obligation to resolve the problem of inherent advantage, concluded by stating: "notwithstanding the fact that they [the Commission] had before it all of the economic testimony, they have selected an approach for preserving the inherent advantage diametrically opposed to it." (Tr. 34)

Now they will undoubtedly contend that the Commission is powerless to select any approach for preserving inherent advantage at all, but, rather, must automatically place its stamp of approval upon compensatory rates.

a compensatory rate below its fully-distributed cost and thereby forcing a lower cost competitor to either establish an unprofitable rate or surrender the business, which motivated the Congress to incorporate the National Transportation Policy objectives into Section 15a(3). Moreover, it did so by reiterating the established full cost measure of inherent advantage only recently considered in detail in the *Grain* case.

The parties plaintiff before the District Court laid great stress upon the testimony of the so-called "four economists" for the railroads, urging that such testimony had been ignored and contending further, apparently, that the Commission's decision had not treated of this subject in sufficient detail. The District Court was obviously influenced by these arguments to conclude that the Commission had left it "completely in the dark" on certain matters and had failed "to set forth adequate reasons to support its own approach." (App. 20) We submit that the opinion below imposes an unreasonably harsh standard of report writing upon the Commission.

At the outset it must be recognized that none of the measurement concepts here before the Commission were novel. The out-of-pocket and fully distributed costs of record were developed in the conventional manner by use of the Commission's own formula which had been referred to and relied upon in innumerable cases. This Court in *New Haven* discussed both of those cost computations as alternative possible measures of inherent advantage and left it to the Commission to choose which of them, or whatever other evaluation, it might determine to be reasonable. The Commission's decision was likewise rendered in the light of the legislative history of Section 15a(3), the opinion of this Court in the *New Haven* case, and a comprehensive summary of the *Ingot Molds* record.

It is submitted that there is no principle of administrative law calling for the rendition by an administrative agency of a detailed treatise in support of its findings. In *Baltimore*

& Ohio R. Co. v. U.S., 298 U.S. 349, 359 (1936) in considering a Commission decision in a so-called division case, the Court held:

> "There is no requirement that the commission specify the weight given to any item of evidence or fact or disclose mental operations by which its decisions are reached. Useful precision in respect of either would be impossible. And it would be futile upon the record to attempt definitely to ascertain the weight assigned to any fact or argument in prescribing the divisions."

So long as sufficient details are recited to make abundantly clear the basis of the Commission's ultimate findings, the agency is not compelled to report special findings as to underlying or subordinate facts as a prerequisite to the validity of its order. *C.B. & Q. Ry. v. United States,* 6 Fed.Supp. 580, 584. A failure by the Commission to make a complete discussion of all the testimony or arguments brought forward by the parties, even if that were here the case, is not grounds for holding the Commission's order to be invalid. *Old Colony Furniture Co. v. U.S.*, 95 Fed.Supp.507, 510.

In any event, as we shall demonstrate, the report of the Commission, coupled with the prior findings of Division 2 expressly incorporated therein by reference, fairly sets forth the basis for the Commission's decision. Succinctness should not be declared a defect. Even if its conclusions might perhaps have been enunciated in greater detail, an order is not rendered invalid by being less comprehensive than it might have been. *N.Y.C. & H.R.R.R. v. I.C.C.*, 168F.Supp.131.

Division 2, in its report, gave full consideration to the railroads incremental cost theory as expounded by the four economists presented on their behalf. That report, under the heading of General Discussion and Ultimate Conclusions, disposed of the railroads' suggested test of inherent advantage by finding that:

> "For carriers to remain in business constant costs must be recovered, which is to say that full costs in the aggregate must be obtained if the nation's transpor-

> tation system is to be healthy. Thus, whenever competitive carriers of different modes assert cost advantages inherent to their respective modes, we have recognized in fully distributed costs the only sound standard of measurement reflecting as many attributable constant costs as it is reasonably practicable to apportion* * * We adhere to the utilization of fully distributed costs as the standard for determining the inherent advantage of low cost in the situation presented. Stated differently, we recognize the existence of constant costs. The use of out-of-pocket or incremental costs advanced herein by respondents ignores them. We decline to so limit our rate-making powers." (App. 40-41)

Division 2 then went on to point out that, having made a determination of inherent advantage, the next issue for resolution was whether or not "a competing rate is destructive of such an advantage." (App. 41)

The District Court, in characterizing a paragraph quoted from the Commission's report as being the only reference therein "to the question of the relative efficiency of the competing carriers in carrying this traffic" (App. 19), ignores the foregoing discussion by Division 2 which the entire Commission subsequently adopted. To this effect the Commission quoted the language from the prior report of Division 2 recognizing fully distributed costs as the only sound standard of measurement of inherent advantage in intermodal controversies and expressly stated "We agree." (App. 66) Most significantly, the Commission preceded this discussion by quoting from the *Grain* case, where it said:

> "Although the fully distributed cost standard requires an arbitrary assignment of constant costs to particular traffic, that standard has generally been employed in measuring inherent cost advantages in intermodal competitive rate controversies." (App. 65-66)

We submit that the basis for the holding is there made abundantly clear and that resort to such a "shorthand" method of writing is not equivalent to a complete absence of rationale as the opinion below concludes.

B. The Railroads' Incremental Cost Theory Would Offset the Water Carriers' Inherent Advantage of Substantially Lesser Overhead Costs.

The crux of the cost comparison problem presented to the Commission in *Ingot Molds* is found in the fact that the the railroads have proportionally greater constant overhead costs than do competing modes of transportation, particularly water carriers. Hence, the spread between the rails' out-of-pocket or incremental costs and their fully-distributed costs of handling particular traffic is generally substantially greater than for the other modes. It is the railroads' position that their heavier constant costs should be ignored in determining which mode has the inherent advantage and should even be treated as beneficial. In essence, this argument boils down to the claim that, in comparing relative *advantages*, the Commission should act as a "handicapper" in a different fashion by eliminating a major *disadvantage* from the equation. In so doing, of course, the fundamental inherent advantage of the water carrier, a right-of-way provided by nature, would be substantially offset.

The railroads' claim that heavy constant costs are an advantage, if taken literally, would suggest that a carrier can improve its competitive posture by adding overhead expenses, an illogical argument that leads directly to bankruptcy. Clearly, they don't mean this; what the railroads actually mean is that the spread between their out-of-pocket and full costs would be an advantage, if out-of-pocket pricing is forced upon the Commission, in that it can be used to nibble away at competitive traffic by electing to forego the complete recovery of constant costs on that traffic. Even assuming, arguendo, that this theory might be beneficial to the railroads themselves, *so long as it is not applied to too much traffic*, the question remains whether it is beneficial to the public and consistent with the objectives of the National Transportation Policy.

As Division 2 found in its report, constant costs actually exist. Ignoring those costs by using incremental or out-of-

pocket costs as the measure of the inherent advantage will not cause the constant costs to disappear—only the competitor's inherent advantage is concealed by this election. For that reason, the Division's report expressly recited its adherence "to the utilization of fully distributed costs as the standard for determining the inherent advantage of low cost in the situation presented" (App. 41) and the Commission stressed the general full cost standard most recently reiterated in the *Grain* case. (App. 65-66)

To the same effect, the report of the Commission expressly disagreed with the railroads' incremental cost standard as a valid measure of inherent advantage, stating that—

> " . . . merely because a carrier is able, without incurring out-of-pocket loss, to handle certain traffic at rates below fully distributed costs, and perhaps by diverting sufficient tonnage from its regulated competitors to maximize thereby the contribution that such traffic would make to its overhead, does not necessarily mean that the carrier is the more efficient of the two." (App. 67-68)

Obviously, even the higher cost of the two modes, lacking the inherent advantage, may *benefit* from capturing traffic that the more economic utilization of the nation's transportation resources dictates should move by the lower cost mode, but that does not alter the relationship between the two or shift the inherent advantage from one to the other.

C. At Most the Four Economists Showed Incremental Pricing To Be Good for the Railroads.

The Commission, as previously indicated, fully considered the railroads' argument, based upon the testimony of the four economists, that adding traffic which contributes anything above incremental costs toward the carriers' overhead increases the profits of that carrier. We are not prepared to concede that incremental pricing is beneficial *even for the railroads* over the long run. As Division 2 appropriately recognized "full costs in the aggregate must be obtained" if carriers are to remain "healthy". (App. 40) Neverthe-

less, even if it be assumed, as did the Commission, that the four economists are correct and that the Pennsylvania and Louisville & Nashville Railroads improved their immediate "profits" by capturing the ingot molds traffic from the barge lines by the subject rate reduction, the shipper didn't save one cent. Such a showing can hardly be demonstrative of the public interest in developing and preserving adequate and efficient transportation. Clearly Congress did not intend, in expressly directing the Commission to give due consideration to the objectives of the National Transportation Policy, that it concern itself solely with what might be good for the railroads, particularly if accomplished only at the price of impairing the inherent advantage of another mode.

Even assuming a short-term advantage to the proponent mode from incremental pricing, manifestly constant costs are real and significant and must eventually be recovered from some source. The incremental or added traffic cost theory here espoused by the railroads, however, would not allocate any overhead costs to a car added to a train as a consequence of capturing new traffic on the theory that the train would operate in any event. But this same argument can appropriately be made by the shippers of every other car in the train who might, accordingly, also reasonably demand incremental pricing. Thus, the theory ignores the fact that, by definition, constant costs represent the indivisible aggregate expense of handling *all* cars, including those successfully diverted from other modes, not just the "other" cars that the railroads would prefer to consider at some other time as they deal with each competitive commodity in them on an incremental cost basis.

The opinion below indicates that the District Court, just as did the four economists, approached the problem solely from the standpoint of the individual self interest of the railroads or the "carriers' own revenues requirements" to employ the phraseology of *New Haven,* rather than in terms of the broader objectives of the National Transportation Policy. Thus, the court below stated:

> "We note that in the situation before us the Commission found not only that the reduced rail rate would be compensatory, but that it would produce greater revenues in excess of out-of-pocket costs than would the former higher rate. The reduced rate therefore will not be detrimental to the railroads' revenue requirements. In these circumstances and in light of the inadequacy of the Commission's report with respect to the recognition and preservation of inherent advantages, we are of the belief that *New Haven* provides no support for the Commission's order. (App. 23)

Clearly, the court's language above ignores the distinction so plainly stated in *New Haven,* particularly in Footnotes 12 and 13, between the test from the standpoint of a carrier's own revenues and that from the standpoint of an intermodal dispute over a claimed inherent advantage. In lieu thereof the District Court invokes a new standard under Section 15a(3), utterly without precedent, i.e., that a reduced rate be approved so long as it is not "detrimental to the railroads' revenue requirements."

A fair reading of both reports of the Commission, which together represent the Commission rationale except to the extent that the former was reversed by the latter, demonstrates that the questions as to which the District Court found itself "completely in the dark" were in fact resolved by the Commission. Turning to the first of these (App. 20), certainly the circumstances in which a carrier with lower out-of-pocket costs is the less "efficient" is the very situation here presented where the competing mode has a natural advantage and is, accordingly, the lower cost mode overall. The concept of inherent advantage contemplates a comparison of *two* modes. The maximum of overhead contribution by *one* mode, hypothesized by the court below in its question, is but half of the equation. Thus, the court's question answers itself when the other half of the comparison is added.

Similarly, the explanation sought by the District Court of "*why the standard* chosen by the Commission *measures* which carrier is more efficient in providing the service here involved" (App. 30) is furnished by the finding of Division 2, expressly adopted by the Commission, that out-of-pocket costs ignore the existence of constant costs which must be recovered if carriers are to remain healthy. (App. 40) It seems perfectly obvious that the Commission is here saying that the relative superiority of an enterprise, an entity, from the standpoint of deciding which mode best serves the transportation needs of the nation and merits preservation over the long run, is not to be made by a comparison which omits the constant costs which are incurred and must be recovered if a carrier is to continue to serve the public.

D. The Railroads' Economic Testimony Was Considered and Rejected - Not Ignored.

The criticism of inadequate consideration is equally as unwarranted as that of inadequately rationalized findings. The ultimate demonstration of the fact that the Commission did not ignore the economic testimony presented by the railroad appellees, but, rather, fully considered the evidence of the four economists is to be found in the unmistakable rejection of those contentions previously described. Manifestly, to disagree is not to ignore. Even where certain testimony has not been discussed in a Commission report, but the reasons for rejecting it are stated, it has been held that such action does not constitute ignoring the evidence. *Columbia Transp. Co. v. U.S.*, 167 F.Supp. 515. As the court there pointed out, failure to give the evidence the weight claimed for it by a party does not amount to ignoring that evidence. Having here considered the evidence of the four economists, which constituted the heart of the railroads' contention for the out-of-pocket test of inherent advantage, and having rejected that testimony for reasons clearly stated in the Commission's reports, it necessarily follows that the Commission's opinion cannot fairly be said to be lacking a rational basis for decision. It would seem that the Dis-

trict Court simply failed to follow the reasoning of the report - and/or does not agree with it - but neither of these circumstances are grounds for setting it aside.

E. The Commission, Having Recognized the Inherent Advantage of the Barge-Truck Mode, Soundly Evaluated the Appropriateness of Protective Action.

Having set forth its reasons for adhering to the *Grain* case standard and selecting full costs over incremental costs as the measure of inherent advantage within the meaning of the statute, the Commission quite properly then applied itself to a determination of whether the inherent advantage thus found to lie with the barge-truck route was endangered by the proposed reduced rail rate. Here again the rationale of the Commission is abundantly clear. This consequential inquiry is again consistent with the guidelines laid down by this Court in *New Haven*. After discussing the possible appropriate methods of deciding which of two competing modes has the cost advantage on a given movement, this Court there stated:

> "And even if the cost advantage on each movement were determined to lie with the coastwise carriers, it may be that some or all of the TOFC rates at issue here should be allowed to stand because they would not unduly impair that advantage." (372 U.S. at 760-761)

Expanding upon this principle, Footnote 14 to the foregoing sentence in the *New Haven* case contains an illustration of a situation in which a reduced rate by a competitor is found *not* to impair a marked inherent cost advantage.

The Brief of the United States in the *New Haven* case urged to this Court that an inherent cost advantage is impaired—

> "when the low cost carrier is unable to fix a rate which (a) covers its fully distributed cost and (b) affords it a rate advantage (as against the high cost carrier) which is no less than the cost differential (measured in terms of fully distributed cost) by the modes."

This suggested standard of ratemaking is obviously more restrictive than that adopted by the Commission in *Ingot Molds* since the order in the latter case did not prescribe a rate differential but simply ordered the cancellation of an unlawfully low rail rate. Reference to the Department of Justice position in *New Haven* is significant, however, in dispelling any suggestion of arbitrary action by the Commission in taking the latter action.

The example from the legislative history discussed in *New Haven* likewise constitutes a recognized situation in which a inherent advantage may fairly be said to be impaired. Finding here that the railroads' reduced rate was below the full costs of the barge-truck mode, just as in the *New Haven* example, the Commission properly concluded that it unlawfully impinged upon the ability of the barge-truck mode competitively to assert its inherent cost advantage. In declining to approve the rate reduction the Commission said that "To hold otherwise we would deprive barges from asserting an inherent cost advantage and we would deprive shippers of cheaper water transportation." (App. 71) Certainly the rationale of this finding is abundantly clear in the Commission's reports. It is not a question, as the District Court suggests (App. 24) of the availability of water transportation on ingot molds alone. The Commission was well aware that it was here dealing with a "test case" and took pains to point out the limited commodities for which rail and barge service compete and the greater reliance by the latter upon the eleven commodity groups accounting for 81.45% of the total barge revenue. (App. 31, 68)

It was, obviously, clear to the Commission and should certainly be apparent in reviewing its reports that it viewed the impairment of inherent advantage, typified by the ingot molds rail rate reduction, as being the mechanism through selective rate-cutting for destruction of the water carriers. As the Commission stated, after pointing to the vulnerability of the barge lines in terms of reliance upon a few commodity groups: "In short, an inherent cost advantage under

the national transportation policy reasonably could not embrace a concept that would impair the ability of a carrier not only to compete but to exist." (App. 68) Manifestly, out-of-pocket pricing by the railroads on such important commodities could readily "deprive shippers of cheaper water transportation", as the Commission thereafter concluded. (App. 68, 71)

Anyone viewing the intensity of the railroad campaign, first, for "the three shall nots" and subsequently, in this *Ingot Molds* proceeding, who does not recognize the railroads' incremental cost theory as a vehicle for the serious impairment, if not extinction of the water carriers, is simply closing his eyes to the realities of the situation. The Commission, in its expertise, was not so naive as to fail to recognize that the impairment and possible loss to the shipping public of cheaper water transportation was here involved. Accordingly, it took appropriate steps to prevent destructive rate action in fulfillment of its obligation under the National Transportation Policy to preserve inherent advantages and encourage efficient and adequate transportation by all modes. One may disagree with that judgment, as the railroads undoubtedly do, but the Commission's reasoning is plainly set forth in its reports and is not validly to be faulted for lack of a stated rationale.

IV.

Recognized Principles of Judicial Review Clearly Warrant Approval of the Commission's Order.

The foregoing analysis of the Commission's reports demonstrated, we submit, that this is a particularly appropriate proceeding for invocation of the rule of administrative expertise. The Commission was presented in *Ingot Molds* with the very issues and, as it later developed, the typical factual situation, that this Court said in *New Haven* should be left to that agency for "initial resolution." Clearly, both the Congress and the *New Haven* guidelines viewed the measure-

ment of inherent advantage called for by Section 15a(3) as embodying complex issues that the Commission is uniquely equipped to handle. Under these circumstances, even more than in the conventional appeal from an administrative decision where no such prior guidance has been provided, the lower court, whatever its own judgment on the merits of the issues presented, should properly have given great weight to the Commission's findings, and, we submit, erred in failing to do so. It is further urged that this Court undertake an independent appraisal of the Commission's order, applying the accepted standards of judicial review. We are convinced that such an evaluation will be persuasive that the administrative expertise reflected in the *Ingot Molds* reports should be left undisturbed by the courts.

The standards to be applied in reviewing an order of the Interstate Commerce Commission have been so frequently and so clearly defined in a virtually endless procession of cases that normally little comment on this subject is required. A particularly appropriate exposition of the principles of judicial review is found in the following language by the court in *Brotherhood of Maintenance of Way Employes v. United States,* 221 F.Supp. 24, aff'd Mem., 375 U.S. 216 (1963):

> "In this lawsuit, our review of the Commission's action is a limited one. We do not start anew and, on the basis of our judgment, determine whether acquisition of control of the B & O by the C & O should be approved. Congress has committed that judgment to the discretion of the Commission. *Minneapolis & St. Louis R. Co. v. United States,* 361 U.S. 173, 188-189. We are limited to determining whether any errors of law were made by the Commission; whether its action was arbitrary, capricious, or an abuse of its discretion, and, upon review of the whole record, whether its findings of fact are supported by substantial evidence. Title 5, U.S.C.A., Section 1009(e); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 95 L.Ed. 456. See also, *General Motors Corp. v. United States,* 207 F.Supp. 641,

643-644 (E.D. Mich. 1962); *United States v. Pierce Auto Freight Lines,* 327 U.S. 515, 90 L.Ed. 821; *Mississippi Valley Barge Line Co. v. United States,* 292 U.S. 282, 78 L.Ed. 1260. If the findings of the Commission are supported by substantial evidence on the whole record, we may not set them aside. Likewise, the weighing of the evidence is reserved exclusively for the Commission, *United States v. Carolina Freight Carriers,* 315 U.S. 475, 490, 86 L.Ed. 971, 983. It is not within the province of the reviewing court 'to substitute inferences of its own for those drawn by the Commission from testimony and * * * to weight anew conflicts in it.' *Chicago St. P., M. & O. R. Co. v. United States,* 322 U.S. 1, 3, 88 L.Ed. 1093, 1095.

In the earlier leading case on this subject to which the Court there referred, *Minneapolis & St. Louis R. Co. v. United States,* 165 F.Supp. 893, 897-98, aff'd 361 U.S. 173, (1959) the court stated—

> "That this Court would or might have arrived at a different conclusion, had it had the duty and responsibility of deciding the controversy between the applicants, is of no consequence.
>
> "It must be remembered that, within the limits of the jurisdiction conferred upon it, the power of a court or an administrative agency to decide questions is not confined to deciding them correctly. *Thompson v. Terminal Shares, Inc.,* 8 Cir., 89 F.2d 652, 655; *Pittsburgh Plate Glass Co. v. National Labor Relations Board,* 8 Cir., 113 F.2d 698, 701.
>
> " 'A controversy like this always calls for a fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted.' *Railroad Commission of Texas v. Rowan & Nichols Oil Co.,* 310 U.S. 573, 580-81; *Pittsburgh Plate Glass Co. v. National Labor Relations Board, supra,* 113 F.2d at page 701."

To the same effect, in *Navajo Freight Lines v. United States,* 186 F.Supp. 377, 383 (D. Colo. 1960), the Court, discussing the Commission's finding, with respect to a transaction under Section 5(2)(b) of the Act, of consistency with the public interest, stated

> "Because of its expertise that body is equipped to resolve all factors and reach a conclusion that conforms to the declared national transportation policy.

The above-quoted principle is particularly appropriate to the instant proceeding inasmuch as the Commission's expertise was here applied, pursuant to the directive of this Court in *New Haven,* to an issue under the National Transportation Policy which the Congress in enacting Section 15a(3) clearly intended to refer to that agency. The Commission, carrying out its duties under that provision of the Act, applied this expertise to the complex problems before it and came up with a solution, i.e., the application of fully-distributed costs as the measure of intermodal inherent advantage. Appellees, and, indeed, the District Court, are free to disagree with the Commission's judgment in electing this standard, but that does not constitute a valid basis for setting aside the Commission's order. Where the Commission made unmistakably clear, as we have demonstrated above, the basis for its determination, and, where, as here it has exercised its expert judgment to select one of the alternative cost standards that this Court indicated in *New Haven* was open to it, the charge of arbitrariness leveled by the District Court cannot be sustained.

In a very recent pronouncement upon the scope of judicial review in an Interstate Commerce Commission proceeding, *Penn-Central and N & W Inclusion Cases,* 19 L.Ed. 2d, 723, decided January 15, 1968, this Court said:

> "With respect to the merits of the merger, however, our task is limited. We do not inquire whether the merger satisfies our own conception of the public interest. Determination of the factors relevant to the public interest is entrusted by the law primarily

> to the Commission, subject to the standards of the governing statute. The judicial task is to determine whether the Commission has proceeded in accordance with law and whether its findings and conclusions accord with the statutory standards and are supported by substantial evidence."

The problem, spelled out in *New Haven,* of first, measuring, and thereafter, if need be, protecting, (372 U.S. at 760) the inherent advantage of a given mode in an intermodal rate controversy, assigned to the Commission by Section 15a(3) is no less complex than the intricate railroad mergers before the Court in the case last cited. Application to *Ingot Molds* of the same principles of judicial review there most recently applied compels the conclusion, we submit, that the doctrine of administrative expertise is nowhere more appropriately applied than here. It follows that the District Court erred in here setting aside an order of the Commission entered in full compliance with the requirements of administrative due process.

V.

The Public Interest in Preserving Inherent Advantages in Transportation and Assuring Adequate Service by All Modes Requires That the Policy-Making Role of the Commission Be Reestablished in This "Test" Case.

The fact that the critically important issues presented upon this appeal arise generally within the context of a rail-barge adversary proceeding should not be permitted to obscure the more fundamental fact that the ultimate interest here, as in all controversies under Section 15a(3) of the Act, is that of the public. It is so basic that there is sometimes a tendency to forget that the National Transportation Policy was enacted as a guide to the actions of the Interstate Commerce Commission, not so that water carriers or railroads or other interested parties might prosper, although, of course, the profit motive is the key to our capitalist economy, but so that this nation might be assured the best possible trans-

portation system by all modes adequate to the needs of commerce and the national defense. It was recognized that such a transportation system could most economically be developed only if each mode were encouraged to provide that service which it is best equipped to perform.

Coming more particularly to the mandate of Section 15 a(3), optimum utilization of the nation's resources necessarily requires that, where inherent advantages in transportation exist, they should be preserved in the public interest. It is equally fundamental to this concept to recognize that the major waterways of the nation, notably the Ohio and Mississippi River Systems, constitute valuable natural resources for many purposes, among them transportation. Otherwise stated, in admittedly simple and unsophisticated terms, the water carriers employing the rivers as a natural right-of-way have an advantage, obviously *inherent* to this method of transportation, over the railroads much of whose assets are "sunk" in their respective man-made rights-of-way.

Congress has not only recognized and indicated its desire to preserve inherent advantages, most especially when those advantages are reflected in lower costs of obvious benefit to the shipping public, it has also made abundantly clear its appreciation of the greater economic power of the railroads to impair the advantages of competitors. By way of illustration, Section 5(2)(b) of the Act, governing the acquisition of control of carriers, expressly imposes a more rigorous burden of proof upon railroads acquiring control of motor carriers, than, for example, upon motor carriers acquiring control of railroads, constituting clear recognition by Congress of the disproportionate power to suppress competition.

Similarly, and much closer to home, it has already been emphasized with respect to Section 15a(3), as ultimately enacted by Congress, that the reference therein to the National Transportation Policy was for the express purpose of giving the Commission the power to prevent a railroad, by reducing its rates below its full costs, from driving a

lower cost water carrier out of business. The intervention of all the nation's major railroads in support of the incremental cost theory of rate-making here involved should suffice to demonstrate that the same apprehension expressed by the Congress (and the Commission as well) at the time that "the three shall nots" were rejected, is still a valid consideration.

As we previously pointed out, the Commission in its reports was not so naive as to fail to recognize that the out-of-pocket measure of inherent advantage advocated by the railroads might threaten the very existence of the barge line industry. (App. 68) By the simple expedient of merely matching the barge-truck charges, the railroads succeeded, as they knew they would, in capturing the ingot molds traffic. The normal $11.86 rate theretofore maintained by the railroads on this commodity was continued in effect, *except between the points involved herein where barge competition exists.* The shipper of ingot molds, who, unfortunately, has no barge service available, continues to pay $11.86 and, accordingly, makes that contribution toward the railroad's constant costs which must be picked up by other shippers in order to make possible selective rate-cutting down to the out-of-pocket cost level. Recognizing that the railroads carry a wide variety of traffic much of which is non-competitive, whereas the barge lines rely almost entirely, as the Commission's report points out (App. 68), upon only eleven commodity groups, all of which are rail competitive, it must be obvious that the railroads have the power to indulge in intermodal rate cuts like that in *Ingot Molds* on a wide front.

The railroad appellees undertook below to justify incremental pricing on the ground that the ability to do so itself constitutes an inherent advantage and that the resultant lower rates are beneficial to the public. The Commission quite properly recognized the fallacy in this argument noting that constant costs exist and must be recovered in the aggregate *somehow* from *someone* if carriers are to remain "healthy." (App. 40) Assuming, however, that rates made

above out-of-pocket costs which attract additional traffic from railroad competitors are beneficial to the railroads, the basic issue which remains is one of the price to be paid by the public to enable the railroads to develop marginal revenues in this manner. We submit that where increased profits - if a constant cost contribution is considered to be profit - can only be realized by diverting traffic from a more economic mode of transportation, thereby jeopardizing the preservation of the latter's inherent advantage, the price to be paid by the public vastly exceeds any benefits. We believe that this is the distinction that this Court undertook to point out in Footnotes 12 and 13 in the *New Haven* case, that is, between a proposed rate made only "from the standpoint of a carriers' own revenue requirements", on the one hand, and, on the other, a rate which reflects the assertion of a proven inherent advantage over other competing modes. (372 U.S. at 760)

It is further submitted that the testimony of the four economists, so greatly stressed by appellees and referred to by the District Court, constitutes a reflection of nothing more than railroad self-interest in no way synonomous with public benefit. In essence, the justification for incremental pricing presented in this economic testimony is that the railroads, by reducing rates below full cost to the point necessary to divert traffic from other modes of transportation, however better equipped the latter to economically handle that traffic, may whittle away at their constant costs and thereby improve their overall profit picture. This theory necessarily assumes, of course, the existence of a reservoir of non-competitive traffic upon which the railroads may charge "all the traffic will bear" in order to make up the overhead deficit that would inevitably follow from substantial across-the-board below full cost rate-making.

All that the four economists have said is that, so long as traffic captured from other modes contributes anything over and above the added cost of handling that traffic, it is "money in the bank" for the railroads. But, unless Section

15a(3) is to be interpreted on some sort of "what's good for General Motors, is good for the country" theory, even if the economists are correct "from the standpoint of a carrier's own revenue requirements" that they will benefit from the proposed rate, this is not the test under Section 15a(3). The barge lines *and the public* will benefit more if inherent advantages of transportation, where they are demonstrated to exist, are preserved and fully exploited rather than impaired and possibly destroyed.

We further submit that under the mandate of the National Transportation Policy the Commission could not have done otherwise than to take seriously the responsibilities imposed upon it by the Congress and to conclude that, irrespective of possible benefits to the self-interest of the railroads, the overriding impaet upon the demonstrably lower cost water carriers, and, consequently, upon the shipping public, would not justify the relief sought by the railroads. Clearly, as this Court recognized in *New Haven,* if Congress had intended the Commission to close its eyes in dealing with a reduced rail rate to any consideration other than the benefit to be derived by the proponent carrier it had ample opportunity to have done so by enacting those railroad-endorsed versions of Section 15a(3) which it "explicitly rejected."

The role of the Interstate Commerce Commission in carrying out the objectives of the National Transportation Policy, would, of course, be seriously curtailed under the ruling of the District Court below. To so restrict the powers of the Commission will be to place the water carriers at the mercy of selective railroad rate cuts, which, if they follow the pattern of *Ingot Molds,* will not give the shipper a rate lower than that now offered by the barge lines but simply deprive the public of the advantages inherent in lower cost water transportation. We submit that, if the purposes of transportation regulation are to prevent abuses and protect the public interest, manifestly, the regulator must be accorded the powers necessary to carry out its responsibi-

lities. As previously indicated, appellants here contend that Congress clearly intended the Commission to have such powers in intermodal controversies and further urge that the public interest in the preservation of an adequate transportation system by all modes compels the reaffirmation in this proceeding of the existence of those powers in the Commission.

VI.

CONCLUSION

For the reasons heretofore stated appellants pray that the judgment of the District Court be reversed and the complaint dismissed.

Respectfully submitted,

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